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ACLU Foundation of Oregon, Inc.

Attorneys for Plaintiffs Rummell, West, Chickadonz, Tanner, and Basic Rights Education Fund

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

DEANNA L. GEIGER and JANINE M.
NELSON; ROBERT DUEHMIG and
WILLIAM GRIESAR,

Plaintiffs,

v.

JOHN KITZHABER, in his official
capacity as Governor of Oregon; ELLEN
ROSENBLUM, in her official capacity as Attorney
General of Oregon; JENNIFER WOODWARD, in
her official capacity as State Registrar, Center for
Health Statistics, Oregon Health Authority, and
RANDY WALRUFF, in his official capacity as
Multnomah County Assessor,

Defendants.

No. 6:13-cv-01834-MC

**JOINT MOTION TO STRIKE
DECLARATION OF JOHN C.
EASTMAN IN SUPPORT OF
MOTION TO INTERVENE**

By Plaintiffs Paul Rummell,
Benjamin West, Lisa Chickadonz,
Christine Tanner, and
Basic Rights Education Fund

and

Plaintiffs Deanna L. Geiger,
Janine M. Nelson, Robert Duehmig,
and William Griesar
(Plaintiffs in Lead Case)

1- JOINT MOTION TO STRIKE DECLARATION OF JOHN C.
EASTMAN IN SUPPORT OF MOTION TO INTERVENE

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PAUL RUMMELL and BENJAMIN WEST;
LISA CHICKADONZ and CHRISTINE TANNER;
BASIC RIGHTS EDUCATION FUND,

No. 6:13-cv-02256-MC

Plaintiffs,

v.

JOHN KITZHABER, in his official
capacity as Governor of Oregon; ELLEN
ROSENBLUM, in her official capacity as Attorney
General of Oregon; JENNIFER WOODWARD, in
her official capacity as State Registrar, Center for
Health Statistics, Oregon Health Authority, and
RANDY WALRUFF, in his official capacity as
Multnomah County Assessor,

Defendants.

CONFERRAL CERTIFICATION

Misha Isaak, counsel for Plaintiffs Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, and Basic Rights Education Fund, conferred in good faith about this motion with Sheila Potter, counsel for John Kitzhaber, Ellen Rosenblum, and Jennifer Woodward; Kate von ter Stegge, counsel for Randy Walruff; and Roger K. Harris, counsel for the National Organization for Marriage, Inc. Ms. Potter and Ms. von ter Stegge take no position on the motion. Mr. Harris opposes the motion.

MOTION

Plaintiffs Paul Rummell, Benjamin West, Lisa Chickadonz, Christine Tanner, and Basic Rights Education Fund (collectively, the “Rummell plaintiffs”), together with plaintiffs Deanna L. Geiger, Janine M. Nelson, Robert Duehmig, and William Griesar (collectively, the “Geiger plaintiffs”), hereby move this Court to strike the Declaration of John C. Eastman in Support of Motion to Intervene (the “Eastman Reply Declaration”) (Dkt. 110), filed on May 9, 2014.

MEMORANDUM OF LAW

The Rummell and Geiger plaintiffs respectfully request that the Court strike the Eastman Reply Declaration for each of the following independent reasons:

1. The Eastman Reply Declaration was filed too late, without justification, and without an opportunity for other parties to respond. Courts do not ordinarily entertain new evidence introduced with a reply brief. *See Hoffman v. Foremost Signature Ins. Co.*, __ F. Supp. 2d __, 2013 WL 5723313, *12 (D. Or. Oct. 21, 2013) (stating that courts are “reluctant” to consider new evidence submitted with a reply brief); *see also Buffets, Inc. v. Leischow*, 732 F.3d 889, 895 (8th Cir. 2013) (holding that a district court “did not abuse its discretion by rejecting evidence that [a party] proffered with its reply memorandum” because, among other things, the evidence “was readily available when it filed its initial moving papers”). The new evidence is particularly objectionable here, where (a) the National Organization for Marriage, Inc.’s (“NOM”) motion to intervene was itself late, (b) the contents of the Eastman Reply Declaration were or should have been known to NOM at the time of its motion to intervene and could have been filed then, (c) the new evidence’s lateness and proximity to the hearing on the motion deprives other parties of a meaningful opportunity to respond. The Eastman Reply Declaration was filed on a Friday night at 11:00 p.m., effectively just two business days before the hearing.

2. The Eastman Reply Declaration is replete with inadmissible hearsay. Federal Rule of Civil Procedure 801 defines hearsay as a statement that “a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Civ. P. 801(c)(2). Unless subject to an exception, hearsay is not admissible. Fed. R. Civ. P. 802. “The hearsay rule provides that an out-of-court statement cannot be admitted for the truth of the matter asserted since the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated ..., and he or she cannot be cross-examined.” *United States v. Pelullo*, 964 F.2d 193, 203 (3d Cir. 1992); *see also* 5 Weinstein & Berger, *Weinstein’s Federal Evidence* § 802.03[3] (2014) (“The rule against hearsay seeks to

eliminate the danger that evidence will lack reliability because faults in the perception, memory, or narration of the declarant will not be exposed.”). The Eastman Reply Declaration contains numerous unreliable, untestable, out-of-court statements offered for the truth of what they assert, including that the declarant “ascertained” from the county clerk whose interests NOM purports to represent that she “is an elected County Clerk who issues marriage licenses, who supports marriage between one man and one woman, who would have religious objections to issuing marriage licenses to persons of the same sex if marriage were redefined in Oregon to encompass same-sex relationships, who would like to intervene in the Oregon marriage case to defend Oregon’s marriage law but was concerned about the risk of harassment, and who would welcome NOM’s intervention on behalf of its members.” (Eastman Reply Decl. ¶ 8.)

3. The two exhibits attached to the Eastman Reply Declaration are also inadmissible because they are not authenticated. “[If a litigant] wants the court to use documents as evidence, they must be authenticated as Fed. R. Evid. 901(a) requires. To authenticate a document, a party must submit ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’ Ordinarily, documents are authenticated by attaching them to an affidavit of an individual who swears that the documents are true and correct copies of the originals.”

McCann-Smith v. St. Mary’s Hosp., No. 11-200, 2012 WL 1313197, *8 (W.D. Wis. April 17, 2012). Here, not only does the Eastman Reply Declaration lack the required affirmation that the exhibits are “true and correct copies,” but, indeed, they appear not to be authentic copies because they do not show the email account from which they were printed.

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For the foregoing reasons, the Rummell and Geiger plaintiffs respectfully request that this Court strike the Eastman Reply Declaration.

DATED: May 13, 2014

s/ Thomas R. Johnson

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DATED: May 13, 2014

s/ Lake James H. Perriguet

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